

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia

JANUARY TERM, 1915.

No. 2772.

196

OTWAY B. ZANTZINGER, APPELLANT.

vs.

MARY V. JOSEPH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 14, 1915.

PRINTED FEBRUARY 26, 1915.

Court of Appeals of the District of Columbia

JANUARY TERM, 1915.

No. 2772.

OTWAY B. ZANTZINGER, APPELLANT,

vs.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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INDEX.

	Original. Print	
Caption	<i>a</i>	1
Affidavit of plaintiff.....	1	1
Undertaking on appeal.....	2	2
Affidavit of plaintiff.....	3	3
Assignment	6	5
Affidavit of defense.....	7	5
Agreement	9	7
Motion for judgment granted; judgment; appeal noted.....	12	8
Memorandum: Supersedeas bond approved and filed.....	13	9
Designation of record.....	13	9
Assignment of error.....	14	9
Clerk's certificate	15	10

In the Court of Appeals of the District of Columbia.

No. 2772.

OTWAY B. ZANTZINGER, Appellant,
vs.
MARY V. JOSEPH.

a Supreme Court of the District of Columbia.

At Law. No. 57189.

MARY V. JOSEPH, Plaintiff,
vs.
OTWAY B. ZANTZINGER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 At Law. No. 57189.

In the Supreme Court of the District of Columbia.

Filed August 22, 1914.

Affidavit of Plaintiff.

In the Municipal Court of the District of Columbia.

No. 93534.

MARY V. JOSEPH, Plaintiff,
vs.
OTWAY B. ZANTZINGER, Defendant.

STATE OF MARYLAND,
County of Prince Georges, ss:

Your complainant, Mary V. Joseph, being first duly sworn according to law, states that she is entitled to the possession of the

premises known as Lot 34 Block 16 in Deanwood Heights as per plat recorded in County Book #15 page #6 in the surveyor's office of the District of Columbia and sometimes described as the premises, store, dwelling, stable, well and lot on which the same are located at 61st and C Streets, Northeast, Washington, located in the District of Columbia, and that the same is unlawfully detained from her and held without right by the defendant, Otway B. Zantzinger, to whom the complainant's assignor, Robert W. Gilliam, had heretofore rented the said premises under a lease agreement between the said Robert W. Gilliam and Otway B. Zantzinger, dated the 5th day of July 1912, and recorded October 18th, 1912, in liber 3572 page 280 of the land records of the District of Columbia, which said lease was duly assigned in writing on the 3rd day of January 1914, by the said Robert W. Gilliam to your complainant, Mary V. Joseph, who is the owner of said property; that the tenancy and estate of the said Otway B. Zantzinger has been determined by ninety days' notice to vacate the said property, which notice was given in writing at least thirty days before the said tenancy was intended to be determined, as provided in the said lease agreement. Your complainant therefore prays that a Summons be issued commanding the defendant to appear and show cause why judgment should not be given against him for the restitution of the possession of said premises, and costs of this suit.

MARY V. JOSEPH.

STATE OF MARYLAND,
County of Prince Georges, ss:

Subscribed and sworn to before me this 9th day of April, A. D. 1914.

LOUIS F. LITZ, [SEAL.]
Notary Public for Md.

Undertaking on Appeal.

In the Municipal Court of the District of Columbia.

Filed August 20, 1914, Municipal Court, District of Columbia.

Filed August 22, 1914.

* * * * *

The defendant desiring to appeal from the judgment of the said court rendered against him in the above-entitled cause on the 15th day of August, 1914, to the Supreme Court of the District of Columbia, and American Fidelity Co., and John L. Russell—his surety hereby appearing and submitting to the jurisdiction of the said Supreme Court, undertake jointly and severally to abide by and pay the said judgment if it shall be affirmed, together with the costs of the appeal, and all intervening damages to the leased property, and compensation for the use and occupation thereof

from the date of the said judgment to the date of its final affirmance, which said judgment, if affirmed, may be rendered against them by said appellate court jointly, or either of them separately, in this case, for the amount of the judgment so affirmed and the intervening damages, compensation and costs aforesaid.

Given under our hands and seals this 19th day of August A. D. 1914.

OTWAY B. ZANTZINGER. [SEAL.]
 AMERICAN FIDELITY COMPANY, [SEAL.]
 By PERCY H. RUSSELL, *Attorney-in-Fact.*
 JOHN L. RUSSELL. [SEAL.]

Witness:

JNO. W. RACEY.

Approve- August 20, 1914, by

ROBERT H. TERRELL, *Judge.*

We consent to the above bond.

SHINN & OWEN.

Affidavit of Plaintiff.

Filed August 31, 1914.

In the Supreme Court of the District of Columbia.

At Law. No. 57189.

MARY V. JOSEPH, Plaintiff,

vs.

OTWAY B. ZANTZINGER, Defendant.

DISTRICT OF COLUMBIA, *To wit:*

Mary V. Joseph, being first duly sworn according to law, deposes and says that she is the person named as plaintiff in the above entitled suit; that Otway B. Zantzinger is the person named
 4 above as defendant in this suit; that the plaintiff makes this affidavit pursuant to rule nineteen of the law rules of the Supreme Court of the District of Columbia, and that the plaintiff claims from the defendant and is entitled to the possession of the premises known as Lot 34 Block 16 in Deanwood Heights as per plat recorded in County Book # 15 page # 6 in the surveyor's office of the District of Columbia and sometimes described as the premises, store, dwelling, stable, well and lot on which the same are located at 61st and C Streets, Northeast, Washington, located in the District of Columbia; that said property is unlawfully detained from the plaintiff and held without right by the defendant, Otway B. Zantzinger; that plaintiff's right of possession of said property arose as follows: That the plaintiff on the 28th day of October 1912 purchased said property from one Robert W. Gilliam, through plaintiff's agent Fred R. Gibbs the

said Robert W. Gilliam having deeded said property to said Gibbs, who by deed dated the 26th day of December 1912 and recorded among the land records of the District of Columbia in Liber 3575 Folio 347 transferred the fee title thereof to this plaintiff; that prior to the taking of title to said property by the plaintiff the said defendant, Otway B. Zantzinger, procured possession of said premises under a lease in writing entered into between the said Robert W. Gilliam and said defendant. Otway B. Zantzinger, dated the fifth day of July 1912, and recorded October 18th, 1912, in liber 3572 page 280 of the land records of the District of Columbia, the said lease having been written by the agent of said defendant, a copy of which said lease agreement is attached hereto referred to and made a part of this affidavit: that on the 3rd day of January 1914 the said mentioned lease agreement was duly assigned in writing by

5 the said Robert W. Gilliam to the plaintiff, Mary V. Joseph, who is the owner of said property; that the tenancy and estate of the said Otway B. Zantzinger has been determined by ninety days' notice to vacate the said property, which notice was given in writing to said defendant as prescribed in the said lease agreement hereinbefore referred to; that after the expiration of the said ninety days' notice to vacate, the defendant, ignoring said notice to vacate, refused to surrender possession of the said property and the plaintiff filed suit in the Municipal Court of the District of Columbia for possession of the same, and on the 15th day of August 1914 a judgment for possession in favor of this plaintiff was rendered, from which judgment the said defendant has appealed to this Court; the plaintiff attaches hereto, refers to and makes a part hereof a copy of letter dated January 5th, 1914 addressed to Mr. Otway B. Zantzinger, the defendant, and signed by George C. Shinn as attorney for this plaintiff, in which said letter the said defendant is notified to quit and vacate said premises at the expiration of ninety days from the date of said letter, which said letter was duly served on the defendant, as required by the agreement of lease hereinbefore referred to; the plaintiff further says that on or about the 10th day of December 1913 fire destroyed the improvements, which are the subject of the foregoing lease, with the exception of a small one story one room frame shed and stable, occupying about 378 square feet of the demised premises, and the remainder of the land has since been vacant and unimproved; and further affiant saith not.

MARY V. JOSEPH.

6 Subscribed and sworn to before me, the undersigned notary public, this 26th day of August 1914.

LOUIS F. LITZ, [SEAL.]
Notary Public.

Term Expires May 1916.

SHINN & OWEN,
Att'ys for Plaintiff, 715 14th St. N. W.

Service of copies of the foregoing affidavit, lease dated July 5th 1912, assignment of lease dated January 3rd, 1914, and letter dated January 5th, 1914, acknowledged this 31st day of August 1914.

HAYDEN JOHNSON,
Attorney for Defendant.

WASHINGTON, D. C., January 3rd, 1914.

For value received I, the undersigned Robert W. Gilliam, hereby assign, set over, and transfer to Mary V. Joseph all my right title and interest in and to a certain lease under seal dated the 5th day of July, 1912, and executed by myself the said Robert W. Gilliam and Otway B. Zantzinger, said lease agreement having been recorded among the land records of the District of Columbia on October 18, 1912, in volume 3572 page 280, and a copy of said agreement being annexed hereto referred to and made a part hereof.

In witness whereof I have hereunto set my hand and seal at Washington, District of Columbia, on the 3rd day of January, 1914.

ROBERT W. GILLIAM. [SEAL.]

Subscribed & sworn to before me this 3rd day of January 1914.

MORTON J. LUCHS. [SEAL.]

Notary Public, D. C.

7

Affidavit of Defense.

Filed October 7, 1914.

* * * * *

DISTRICT OF COLUMBIA, ss:

Otway B. Zantzinger, being first duly sworn, deposes and says:

That he is the party named as defendant in the above entitled cause wherein Mary V. Joseph is named as plaintiff.

He denies the right of the plaintiff to recover from him the possession of the premises known as Lot 34, Block 16, in Deanwood Heights, as per plat recorded in County Book 15, page 6, in the Surveyor's Office of the District of Columbia, and also described as premises, store, dwelling, stable, well and lot on which the same are located, at 61st and C Streets, Northeast, in the City of Washington, District of Columbia; he further denies that said property is unlawfully detained from the plaintiff and held without right by him.

That the facts upon which the defendant bases his claim to possession of said property are as follows:

On July 5, 1912, one Robert W. Gilliam, who then was and for some time had been the owner in fee of said property, executed to affiant a lease of said premises "for the period of three years commencing on the Fifth day of July, A. D., 1912, at and for the monthly rent of Eighteen Dollars (\$18.00) payable in advance; * * * with the distinct understanding that privilege is hereby granted the party of the second part to occupy the said premises for three years more after the expiration of the first three year term,

8 if he so desires upon the same terms and conditions as herein specified for the first three year term." That a copy of said lease in full is annexed hereto and made a part of this affidavit; that affiant has continued in possession under said lease up to the present time; that on the 18th day of October, 1912, the said lease was recorded among the land records of the District of Columbia in Liber 3572, at folio 80, et seq.; that thereafter on the 28th day of October, 1912, one Frederick R. Gibbs recorded among the land records of the District of Columbia, a certain deed in fee wherein and whereby the aforesaid Robert W. Gilliam conveyed to him the property made the subject of the aforesaid lease and also the subject of the present action; that thereafter on December 27, 1912, the plaintiff Mary V. Joseph recorded among the land records of the District of Columbia a deed conveying said property from the said Gibbs to herself; that said Mary V. Joseph received her deed to said property not only with the constructive record notice of the outstanding leasehold estate of affiant therein, but also had actual notice given her agent and broker, Joseph D. Sullivan, by affiant, of the existence of said lease prior to her acquisition of title to said property. Affiant further says that the plaintiff since her purchase of said property has recognized the existence and validity of the leasehold estate of affiant in said property for the term mentioned in said lease; that on January 15, 1912, said plaintiff wrote to affiant a letter in words and figures as follows:

WASHINGTON, D. C., Jan'y 15, —.

Mr. O. B. Zantzinger, New York Ave. & 9th Sts. N. W.

MY DEAR MR. ZANTZINGER: I submit for your consideration the following proposition.

9 If you will surrender to me as present owner of the premises at the southwest corner of 61 & C St. N. E. the three year lease now on said property which was given you by Rob't W. Gilliam, dated July 5, 1912, I will lease to you free of all rent the room you now occupy as a real estate office on the same lot for the unexpired time of said Rob't W. Gilliam lease or about five years and six months.

And will also agree with you that there will be during this term of said lease, *that there will* no saloon either retail or wholesale permitted on any part of said premises and also agree with you that no colored person or person of negro blood will occupy any of said premises and will also agree to let you have free of rent a sufficient amount of space in the stable in the rear for your horse and buggy during said term of lease.

I will further agree with you not to rent any part of the premises for a real estate office, and it is further agreed that your office will be occupied only as a real estate office, and no other line of business.

Yours very truly,

MARY V. JOSEPH.

Affiant further says that he has performed all the terms and conditions of the aforessaid lease.

Affiant further says that on January 5, 1914, the plaintiff Mary V. Joseph, through her attorney, George C. Shinn, Esq., served upon him a notice to quit and vacate the premises in question at the expiration of ninety days from said date; that the term of said lease, however, not having expired he declined to comply with the demand of said notice.

Affiant further denies all the facts contained in the plaintiff's affidavit filed herein which are inconsistent with the above facts.

OTWAY B. ZANTZINGER.

Subscribed and sworn to before me this 5th day of October, A. D. 1914.

[SEAL.]

G. L. BUNNELL,
Notary Public, D. C.

(Copy.)

This agreement, made this 5th day of July, 1912, between Robert W. Gilliam of the first part, and Otway B. Zantzinger of the second part, all of the City of Washington, District of Columbia, whereby the party of the first part has let, and does
10 hereby let, to the said party of the second part, the premises known as store, dwelling, stable, well and lot on which the same are located at 61st and C Streets, Northeast, in said city, by the month for the period of three years commencing on the Fifth day of July, A. D., 1912, at and for the monthly rent of Eighteen Dollars (\$18.00) payable in advance; that is to say, on the Fifth day of each month as rent in advance for the ensuing month, with the distinct understanding that privilege is hereby granted the party of the second part to occupy the said premises for three years more after the expiration of the first three year term, if he so desires upon the same terms and conditions as herein specified for the first three year term.

And the said party of the second part has agreed to take, and does take and hold the said premises as tenant by the month, at the said rent, payable as aforesaid; that he will pay the water rent and gas bills as they become due, and that he has the right to sublet or assign the said premises, or any part thereof, or carry on any business therein without the consent of the said lessor, but cannot use the same for any disorderly or unlawful purpose. Provided, that if the said lessee shall fail to pay the said rent in advance as aforesaid, although there should have been no legal or formal demand for the same, or shall neglect to pay the water rent or gas bills at the time or on the day when the same shall be due or fall payable, as hereinbefore mentioned, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then,

11 and in either of the said events, this agreement, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the said lessor, his heirs and assigns, shall and may proceed to recover possession of said premises under the provisions of the Code of Law for the District of Columbia to regulate

proceedings in cases between landlords and tenants; but if no default occurs on the part of said lessee, then he shall be entitled to not less than ninety days' notice to vacate the house and premises, which notice shall be given in writing, at least thirty days before said tenancy is intended to be terminated, and the owner or agent shall be entitled to the same notice from the lessee should he desire to vacate the aforesaid house and premises.

And it is further provided, that if, under the provisions of this Agreement, default be made and a compromise or settlement shall be made thereupon, it shall not constitute a waiver of any covenant herein contained. And the said lessee hereby agrees to deliver the house in the same order in which it was received, usual wear and tear, fire and storm excepted, and it is further agreed that no waiver of one breach of any covenant herein contained shall be construed to waive or in any manner affect the covenants of this Agreement.

It is further agreed that rent shall cease if the said premises be destroyed by fire or any unavoidable casualty, so as to make them uninhabitable.

In testimony whereof, We have hereunto set our hands and seals the day and year first hereinbefore written.

ROBERT W. GILLIAM. [SEAL.]
OTWAY B. ZANTZINGER. [SEAL.]

Witness:

G. W. BUNNELL.

12 DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, Percy H. Russell, a Notary Public in and for the District of Columbia, Robert W. Gilliam and Otway B. Zantzinger, parties to the above Instrument in Writing bearing date on the 5th day of July A. D. 1912, and hereto annexed, being personally well known to me as the persons who executed said Lease, or Instrument in Writing, and acknowledged same to be their act and Deed.

Given under my hand and Notarial seal this 18th day of October A. D. 1912.

PERCY H. RUSSELL,
Notary Public, D. C.

Supreme Court of the District of Columbia.

SATURDAY, November 28th, 1914.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

Before Judge Anderson.

Upon consideration of plaintiff's motion filed herein for judgment for want of sufficient affidavit of defense, it is ordered that said motion be and the same is hereby granted. Wherefore, it is considered that the plaintiff herein have and recover of defendant pos-

session of the premises known as Lot 34 Block 16 in Deanwood Heights, as per plat recorder in County Book 15 page 6, in the Surveyor's Office of the District of Columbia, and recover of said defendant and American Fidelity Company and John L. Russell, his sureties her costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the defendant by his attorney of record, in open court, notes an appeal to the Court of Appeals, whereupon the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars (\$100.00) or as a Supersedeas in the sum of Five Hundred Dollars.

Memorandum.

December 7, 1914.—Supersedeas bond approved and filed.

Designation of Record.

Filed January 5, 1915.

* * * * *

The clerk of said court will please prepare record on appeal in the above entitled cause, said record to include:

1. Affidavit of plaintiff filed in the Municipal Court.
2. Bond on appeal from the Municipal Court to the Supreme Court of the District of Columbia.
3. Affidavit filed by plaintiff in the Supreme Court of the District of Columbia.
4. Counter affidavit filed by defendant in the Supreme Court of the District of Columbia.
5. Entry of judgment.
6. Memorandum of filing of bond on appeal to Court of Appeals.
7. Assignment of Error.
8. Designation of record.

HAYDEN JOHNSON,
Attorney for Defendants.

14

Assignment of Error.

Filed January 7, 1915.

* * * * *

The defendant assigns as reversible error the action of the trial court in holding that the lease set out in the affidavit of defense was not a lease for three years with the privilege of a three-year renewal, and sustaining the motion of the plaintiff for judgment for want of a sufficient affidavit of defense.

HAYDEN JOHNSON,
Attorney for Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

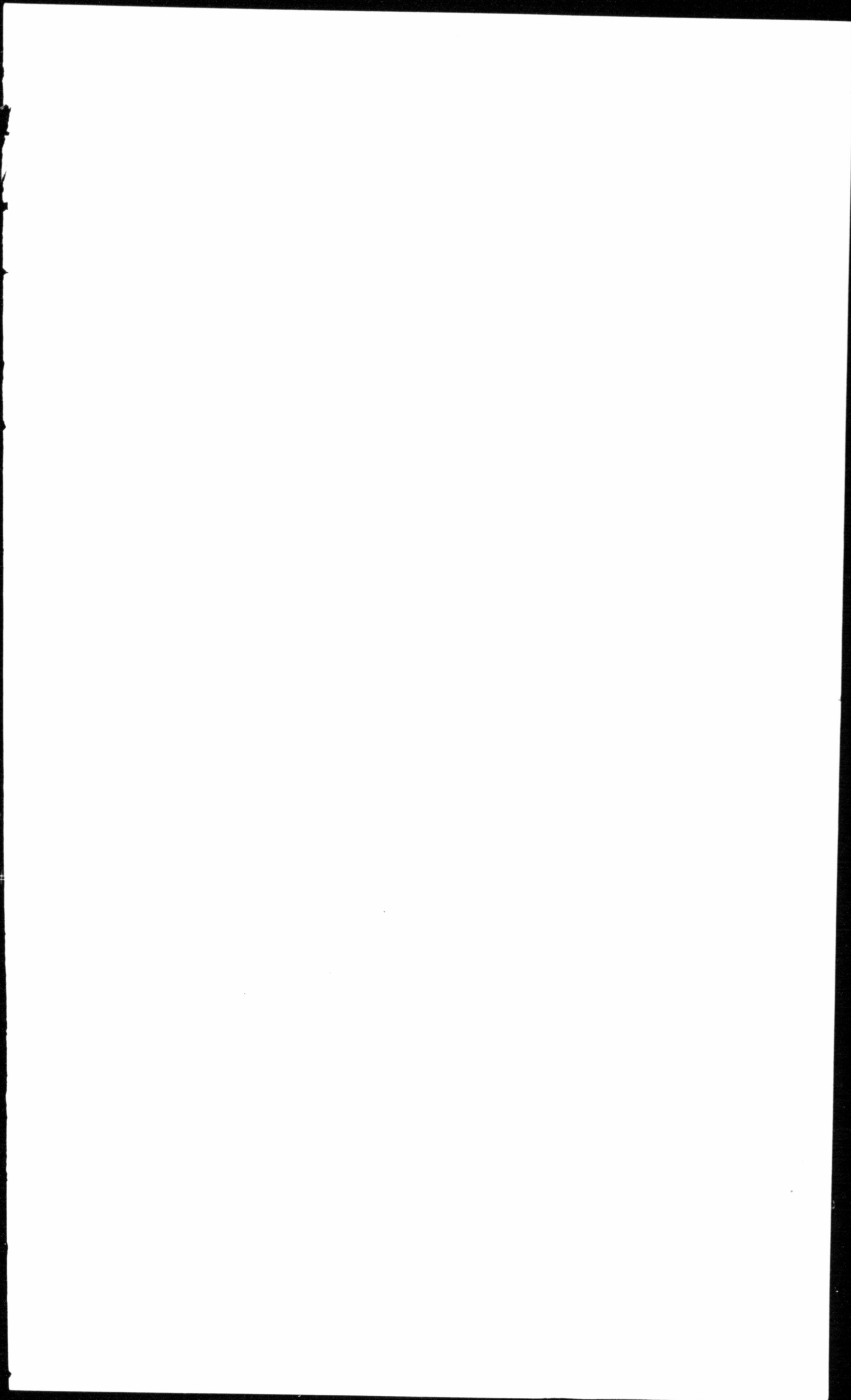
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57189 at Law, wherein Mary V. Joseph is Plaintiff and Otway B. Zantzinger is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of January, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2772. Otway B. Zantzinger, appellant, vs. Mary V. Joseph. Court of Appeals, District of Columbia. Filed Jan. 14, 1915. Henry W. Hodges, clerk.



COURT OF APPEALS
~~DISTRICT OF COLUMBIA~~
FILED

MAR.-31-1915

Henry W. Hodges
Clk.

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1915.

—
No. 2772.
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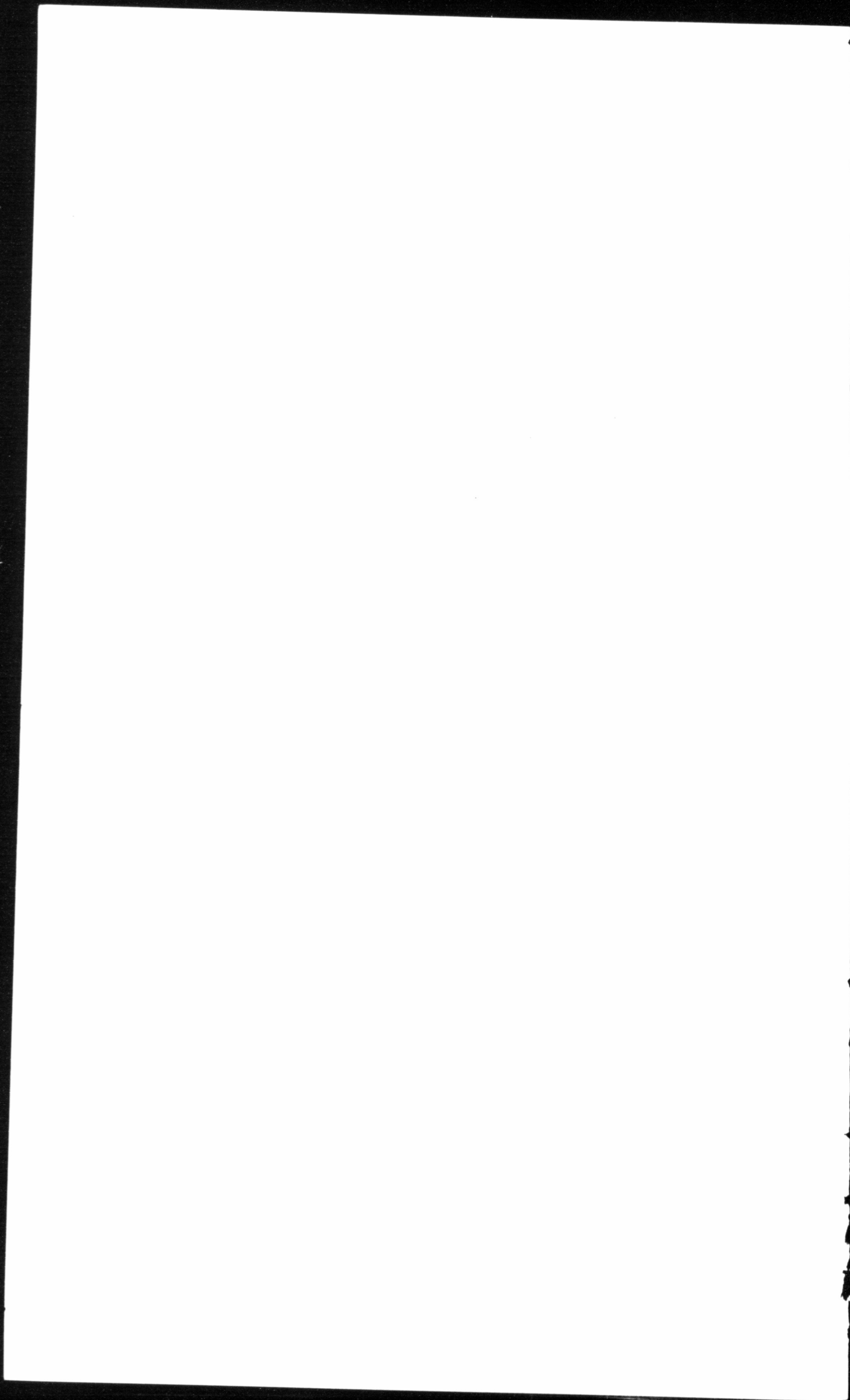
OTWAY B. ZANTZINGER, *Appellant*,

v.

MARY V. JOSEPH, *Appellee*.

—
BRIEF ON BEHALF OF APPELLANT.
—

HAYDEN JOHNSON,
for Appellant.



IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1915.

No. 2772.

OTWAY B. ZANTZINGER, *Appellant*,

v.

MARY V. JOSEPH, *Appellee*.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

This is an appeal from a judgment of the Supreme Court of the District of Columbia for the possession of real estate, awarded under Law Rule 19 of that court, on an appeal from a judgment of the Municipal Court of the District of Columbia in a landlord and tenant proceeding. The facts are in substance as follows:

On July 5, 1912, one Robert W. Gilliam, who was then

the owner in fee of Lot 30, Block 16, in Deanwood Heights, in the District of Columbia, executed to the appellant, Otway B. Zantzinger, a lease of said premises "*for the period of three years commencing on the fifth day of July, A. D., 1912, at and for the monthly rent of \$18.00 payable in advance; * * * with the distinct understanding that privilege is hereby granted the party of the second part (Zantzinger) to occupy the said premises for three years more after the expiration of the first three-year term, if he so desires, upon the same terms and conditions as herein specified for the first three-year term.*" The lease contains certain covenants and a provision that it shall terminate should the lessee break any of said covenants, and then provides, "*but if no default occurs on the part of said lessee, then he shall be entitled to not less than ninety days notice to vacate the house and premises, which notice shall be given in writing at least thirty days before said tenancy is intended to be terminated, and the owner or agent shall be entitled to the same notice from the lessee should he desire to vacate the aforesaid house and premises.*"

Zantzinger went into possession under this lease and has remained in possession up to the present time. On October 18, 1912, the lease was recorded among the land records of the District of Columbia. On October 28, 1912, one Frederick R. Gibbs recorded among the land records a deed in fee whereby the aforesaid Robert W. Gilliam conveyed to him the property made the subject of this lease. On December 27, 1912, the appellee, Mary V. Joseph, recorded among the land records a deed conveying the property from Gibbs to herself. Mrs. Joseph received her deed not only with the constructive record notice of the outstanding leasehold estate of Zantzinger, but also had actual notice of the existence of the appellant's lease. On January 25, 1912, Mrs. Joseph wrote Zantzinger a letter which is contained in

the record (page 8), in which she recognizes the latter's three-year lease of the premises.

On January 5, 1914, Mrs. Joseph caused a ninety-day notice to quit to be served on Zantzinger. On April 9, 1914, Mrs. Joseph instituted in the Municipal Court a landlord and tenant proceeding against Zantzinger for the recovery of possession of the premises, claiming that his tenancy and estate had been terminated by the ninety-day notice to quit.

The judgment of the Municipal Court being for the plaintiff, the defendant Zantzinger appealed to the Supreme Court of the District of Columbia. After the appeal was docketed in the latter court, the plaintiff availing herself of the provisions of Law Rule 19 of said court, filed an affidavit in the cause, in which she set out the facts upon which she based her claim to the property.

The defendant filed a counter affidavit (Record, page 5), reciting the facts above set forth and making a part of his affidavit the lease before mentioned. Thereafter a motion for judgment on the part of the plaintiff for want of a sufficient affidavit of defense was granted by the court under the provisions of said rule. From this judgment the defendant has prosecuted this appeal.

ASSIGNMENT OF ERROR.

The defendant assigns as reversible error the action of the trial court in holding that the lease set out in the affidavit of defense was not a lease for three years with the privilege of a three years' renewal, and sustaining the motion of the plaintiff for judgment for want of a sufficient affidavit of defense.

ARGUMENT.

The single question presented on this appeal is the effect to be given the lease of July 5, 1912. If the lease creates

an estate for years, the term had not expired at the time the suit was brought and the judgment should have been for the defendant. If it creates an estate at will, the plaintiff, having served the notice required by the lease, must be held to have terminated the tenancy and the judgment for the plaintiff was correct.

It is submitted:

First: That the premise of the lease clearly creates an estate for years and the further provisions of the instrument are harmonious with that idea, and therefore judicial interpretation of its terms is unnecessary.

Second: If the terms of the lease are inconsistent, the court by resort to well recognized rules of interpretation should construe it as a lease for years.

I.

LEASE NOT OPEN TO JUDICIAL INTERPRETATION.

The understanding of the parties, although awkwardly expressed, can be readily gathered from the language of the lease. The letting is expressed to be "*for the period of three years, commencing on the fifth day of July, 1912, * * * with the distinct understanding that the privilege is hereby granted the said party of the second part to occupy the premises for three years more after the expiration of the first three-year term, if he so desires upon the same terms and conditions as herein specified for the first three-years term.*"

It would be impossible to express in clearer language the term of the lease. Section 1032 of the Code provides:

"An estate for a determinate period of time is an estate for years."

The estate here created is for a determinate period of time and is therefore an estate for years.

Is there anything further in the language of the instrument that can be construed as modifying "*the distinct understanding*" respecting the duration of the term? It is submitted that there is not. The lease contains certain covenants for the payment of rent, water rent, gas bills, and which prohibit the use of the premises for disorderly or unlawful purposes; it provides for the termination of the lease in the event of the breach by the lessee of any of these covenants. Of course this means a termination at the option of the lessor. (Channel vs. Moonfield, 206 Ill., 278; 69 N. E. 32; 24 Cyc., 1347.)

Following these covenants it is provided, "but if no default occurs on the part of the said lessee then he shall be entitled to not less than ninety days' notice to vacate the house and premises, which notice shall be given in writing, at least thirty days before *said tenancy is intended to be terminated*, and the owner or agent shall be entitled to the same notice from the lessee should he desire to vacate the aforesaid house and premises." This provision standing alone would no doubt be construed as creating an estate at will, but being read in connection with the paragraph creating the estate for years, it must be given a different construction. There is nothing in the provision that indicates any intention to shorten the term before created. The notice provided for must be given "at least thirty days *before said tenancy is intended to be terminated*." When is the tenancy, by the terms of the lease, intended to be terminated? The lessor can not terminate it against the will of the lessee until the expiration of six years from its date, July 5, 1912. The lessee, if he desires, can terminate it at the end of three years

or at the end of six years from its date. Now, at the end of the term, in the absence of an agreement to the contrary, the lessee would, under Code Section 20, be entitled to no notice to quit and could be proceeded against summarily by the lessor for the recovery of possession; or, if he remained in possession after the end of the term and continued to pay rent under Code Section 1034, he would be regarded as a tenant by sufferance, and under Section 1221 he would become entitled to a thirty-day notice to quit. The parties, by the last quoted provision of the lease, merely attempted to alter the position they would otherwise occupy at the end of the term, in virtue of these Sections of the Code, by agreeing to the giving of reciprocal notices which the statute does not require.

II.

IF OPEN TO INTERPRETATION THE LEASE MUST BE CON- STRUED AS CREATING AN ESTATE FOR YEARS.

If the lease is ambiguous its only ambiguity lies in the fact that by its terms two distinct and inconsistent estates are attempted to be created. The estate created in the premise is clearly an estate for years. The estate created by the later provision, if the construction before suggested is not correct, is clearly an estate at will.

D. C. Code, Section 1032. "ESTATES FOR YEARS.—An estate for a determinate period of time is an estate for years."

D. C. Code, Section 1036. "ESTATES AT WILL.—An estate at will is one held by the joint will of lessor and lessee, and which may be terminated at any time, as herein elsewhere provided, by either party; and such estate shall not exist or be created except by express contract."

If the estate is for years it can not be terminated at the will of either party, that being opposed to the very object for which an estate for years is created.

If the estate is at will "the distinct understanding" that it shall be for years must be read out of the lease.

The language creating one of the estates must, therefore, be discarded as repugnant to the other provisions of the instrument. The question then is, which of the two estates shall be held to have been created by the lease?

There is, of course, such a thing as an estate for years or until the happening of a contingency, "such as the dissolution of a partnership, or the end of a postmaster's term, or the breaking down of machinery," 24 Cyc., 1337. But the contingency can never be made *the mere giving of a notice by either party*, because as soon as that is provided for the estate ceases to be an estate for years and becomes under Code Section 1036 an estate at will.

An example of an estate limited upon a contingency is found in *Fowler v. Tavenner*, decided by Mr. Justice Barnard of the Supreme Court of the District of Columbia, in 34 W. L. R., 307, where the lease provided that the lessee should be entitled to occupy the premises until such time as the owner, his heirs or assigns, should desire the same or part thereof for building purposes. In that case it was held that a notice from the owner to the lessee that he desired the premises for building purposes had the effect of terminating the tenancy. In his opinion in that case Mr. Justice Barnard refers to the case of *Shaw v. Hoffman*, 25 Mich., 162, in which the distinction between an *estate at will* and an *estate for years limited upon a contingency* is very clearly drawn. In this case the Court said:

"A tenancy at will properly so called can exist only when it is equally at the will of *both* parties, each hav-

ing the equal right to terminate the lease or tenancy at his option. * * *

"This was a tenancy for five years upon the condition if the lessor should before the end of said term conclude to build upon the premises and give the lessee notice of such determination to build and of his desire that the lease should be given up, it should be determined."

There being then two inconsistent estates created by the same instrument, the question, as before suggested, is, to which should effect be given. There are four rules for the construction of instruments that may be invoked by the defendant in support of his contention that the estate should be treated as one for years.

First: There is a well established rule that where there is a clear and manifest repugnance between the premise and the habendum clause of a deed, the former must prevail. In *Robinson v. Payne*, 58 Miss., 690, 708, a deed by the premise or granting clause conveyed the land unto the "said party of the second part, her heirs and assigns forever." In the habendum it provided that the grantee shall "have and hold the above mentioned negroes, etc., so long as she may live, and in case of her death the said land and negroes to pass to the use and benefit of her child or children; and in case of there being no offspring she is at liberty to will away the above described land and negroes as she may wish." In referring to the argument that the deed conveyed only a life estate, the court said:

"This seems plainly an attempt to convert the absolute fee conveyed by the granting clause into a life estate by the habendum, which can not be done. *From the earliest times the decisions are uniform that where there is a clear and manifest repugnance between the premise and the habendum clause of a deed the former must pre-*

vail; and the doctrine is no less well recognized and maintained now than in the days of Coke and Sir Matthew Hale."

Second: Leases of doubtful duration must be construed favorably to the tenant, 24 Cyc., 961. In *Nicolopole v. Love*, 39 App. D. C., 343, this court held:

"Where a contract will admit of two constructions, either of which is reasonable, the one most favorable to the grantee must be adopted *on the principle that a man's grant shall be construed most strongly against himself.*"

As one of its authorities for this proposition the court cites *McNeile v. Philadelphia County*, 3 Brewster (Pa.), 537, which seems to be a leading case on the point. In that case the court said:

"In all cases of uncertainty *the tenant is most favored by law* because the landlord having the power of providing expressly in his own favor has neglected to do so and on the principle, also, *that every man's grant shall be taken most strongly against himself.*"

The appellant is the tenant and the lease will certainly reasonably admit of the construction claimed by him, if it is not the only construction that can be placed upon it, and, under the authority of the above cases, it is submitted that construction should be given it.

Third: In the case of ambiguity the court will give to the paper the construction which the parties themselves have given it.

"Thus when a lease is ambiguous as to *the length of the term*, the construction placed upon it by the acts

of the parties will, if in itself admissible, be adopted as the true intent thereof." 24 Cyc., 960.

The affidavit of defense sets out a letter written by the plaintiff to the defendant, in which, among other things, she says:

"If you will surrender to me as present owner of the premises at the southwest corner of 61st and C Sts., N. E., *the three-year lease* now on said property which was given you by Robt. W. Gilliam, dated July 5, 1912, I will lease to you free of all rent the room you now occupy as a real estate office on the same lot *for the unexpired term of said Robt. W. Gilliam's lease or about five years and six months.*"

The plaintiff was not one of the original parties to the lease but is privy in estate with the grantor.

Fourth: The court will give the paper that construction which carries out the obvious intent of the parties.

"The rule most conspicuous and wide-reaching of all is that a written contract shall be so interpreted, as, if possible, to carry out what the parties meant." Bishop on Contracts, par. 380.

It is believed that there can be no doubt but that the parties to this lease intended that the estate created should be one for years. In this connection the court's attention is again called to the language "*with the distinct understanding that privilege is hereby granted the party of the second part to occupy the said premises for three years more * * *.*" A *distinct understanding* that the tenant should remain in possession for the length of time specified is certainly inconsistent with the idea that he might be evicted at any time by a ninety-day notice.

In conclusion it is respectfully urged that the lease being one for years, and the term created by it not having expired, the appellant was at the time of the institution of the landlord and tenant proceedings and still is in rightful possession of said premises under said lease, and that for this reason the judgment of the court below awarding possession to the appellee is erroneous and should be reversed.

Respectfully submitted,

HAYDEN JOHNSON,
for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR. 20-1915

Henry W. Hodges
Clint

IN THE

Court of Appeals, District of Columbia

No. 2772.

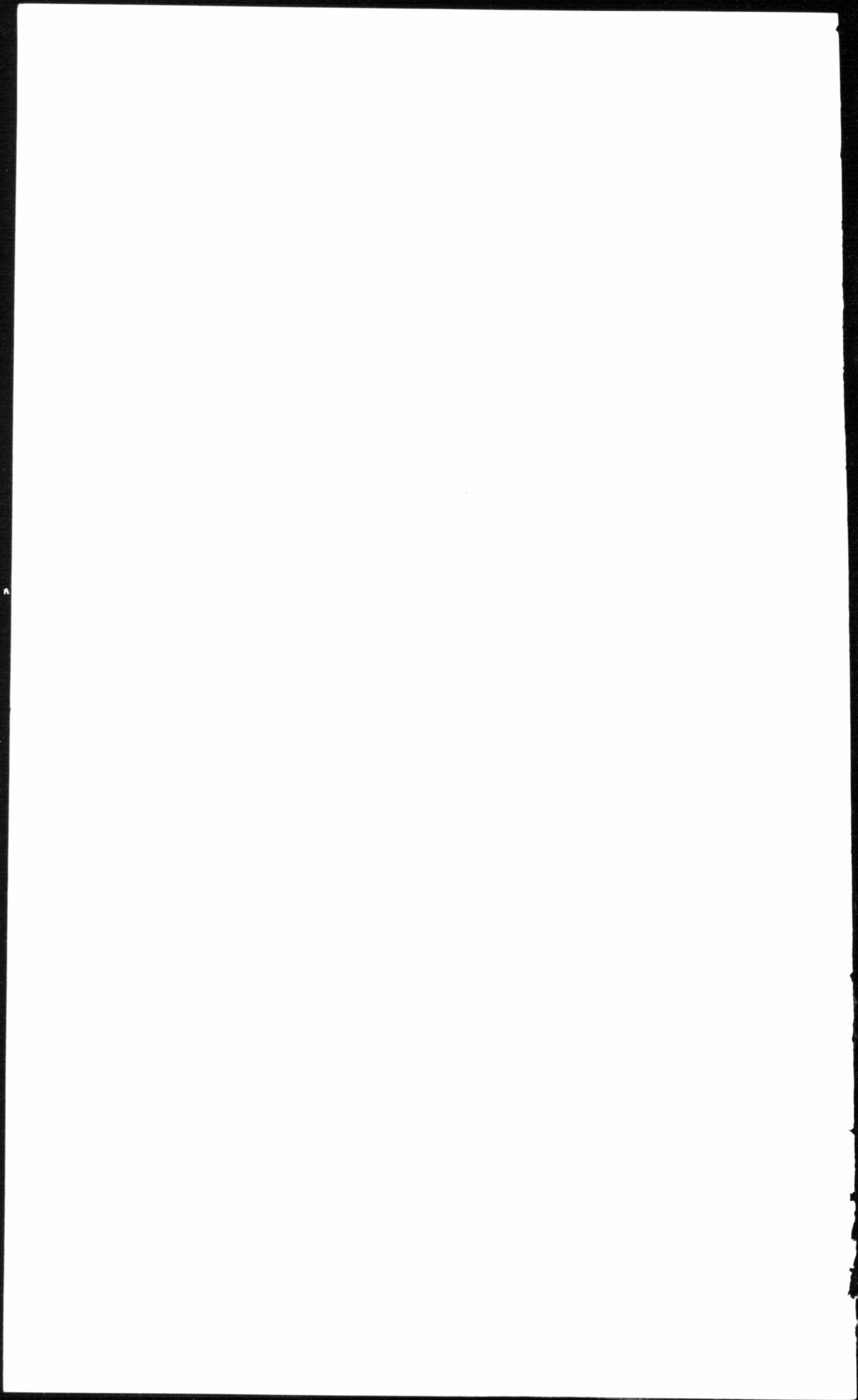
OTWAY B. ZANTZINGER, *Appellant,*

vs.

MARY V. JOSEPH, *Appellee.*

BRIEF ON BEHALF OF APPELLEE.

GEORGE C. SHINN,
CLAUDE W. OWEN,
Attorneys for Appellee.



IN THE

Court of Appeals, District of Columbia

No. 2772.

OTWAY B. ZANTZINGER, *Appellant*,

vs.

MARY V. JOSEPH, *Appellee*.

BRIEF ON BEHALF OF APPELLEE.

ADDITIONAL STATEMENT OF CASE.

This case was filed originally in the Municipal Court of the District of Columbia, where, after trial, judgment was rendered in favor of appellee, then plaintiff. Upon appeal being taken to the Supreme Court of the District, the case was presented by counsel to the Court on affidavits of the respective parties, it being deemed that the issues involved were largely of law, rather than fact. And it is in this shape that the case is now being considered in this Court. There are certain circumstances and features of the case to which

counsel for appellee respectfully direct the Court's particular attention.

First, the lease in question was procured by Zantzinger, appellant, from the then owner, Gilliam, on July 5, 1912, and recorded October 18, 1912, a short time before Mary V. Joseph, appellee, took title to the property through her agent Gibbs (R., p. 2). Mrs. Joseph, at the time of purchasing the property, and at the time Zantzinger obtained his lease, was occupying the premises as a tenant of Gilliam, the former owner, and she continued to occupy the premises until evicted, after which Zantzinger subleased to a tenant who occupied it until the fire occurred on the 10th day of December, 1913. After the fire, Zantzinger continued to occupy a small one-story, one-room shed on the said lot (R., p. 4). The burnt portion was never rebuilt.

The record does not show that Mrs. Joseph had *actual personal* notice of the existence of Zantzinger's lease, when she took title to the property. She had constructive record notice and also actual notice to her agent and broker, Joseph D. Sullivan (R., p. 6). While it may be true that notice to the agent is notice to the principal, the lack of *actual personal* knowledge may be important in considering the effect of Mrs. Joseph's conduct in writing a letter respecting the said lease, which will be again adverted to in the argument.

Mr. Zantzinger wrote the lease (by his agent) (R., p. 4).

The appellant in his statement of the terms of the lease under consideration in this case (appellant's brief, p. 2) neglects to include clauses having a most important bearing on the construction to be given to the instrument. We here quote from the lease giving *all* of the provisions which affect its construction.

“* * * the party of the first part has let, and does hereby let, to the said party of the second part, the

premises known as store, dwelling, stable, well and lot on which the same are located at 61st and C Streets, Northeast, in said City, *by the month* for the *period of three years* commencing on the fifth day of July, A. D. 1912, at and *for the monthly rent of Eighteen Dollars* (\$18.00), payable in advance for the ensuing month, with the distinct understanding that privilege is hereby granted the party of the second part to occupy the said premises for three years more after the expiration of the first three-year term, if he so desires, upon the same terms and conditions as herein specified for the first *three-year term*.

And the said party of the second part has agreed to take, and does take and hold the said premises as *tenant by the month*, at the said rent, payable as aforesaid; that he will pay the water rent and gas bills as they become due, and that he has the right to sublet or assign the said premises, or any part thereof, or carry on any business therein without the consent of the said lessor, but can not use the same for any disorderly or unlawful purpose. Provided, that if the said lessee shall fail to pay the said rent in advance as aforesaid, although there should have been no legal or formal demand for the same, or shall neglect to pay the water rent or gas bills at the time or on the day when the same shall be due or fall payable, as hereinbefore mentioned, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then, and in either of the said events, this agreement, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the *thirty days' notice to quit* being hereby expressly waived. And the said lessor, his heirs and assigns, shall and may proceed to recover possession of said premises under the provisions of the Code of Law for the District of Columbia to regulate proceedings in cases between landlords and tenants; but if no default occurs on the part of said lessee, then he shall be entitled to not less than ninety days' notice to vacate the house and premises, which notice shall be given in

writing, at least thirty days before said tenancy is intended to be terminated, and the owner or agent shall be entitled to the same notice from the lessee should he desire to vacate the aforesaid house and premises." (R., pp. 7-8.)

ARGUMENT.

Counsel for appellant, in his brief, mentions several rules of construction of deeds, to which we will now refer:

First. "Where there is a repugnance between the *premises* and the *habendum clause* of a deed the former must prevail."

We submit that this rule has no application to the lease in question here, for the courts have always recognized the validity of clauses in leases, limiting and qualifying the estate granted, as will hereinafter be shown.

At most, under any reasonable construction of the language employed in the lease, it can not create a term certain for a greater period than ninety days, because of the privilege, mutual in its language and intent, authorizing either party to terminate the tenancy upon ninety days' notice. There is no more justification for construing the lease to be one for three years than there is for construing it to be one by the month. Both expressions, "for the period of three years" and "by the month," are used in the *premises* of the lease. Each of the expressions is contrary to the other, creating an ambiguity which is fully cleared up and explained by the plain and unambiguous language of the subsequent clause giving either party the right to terminate the lease upon ninety days' notice. The only clear and unambiguous thing in the lease is this privilege with regard to terminating the lease upon giving ninety days' notice.

Second. "Leases of doubtful duration must be construed favorably to the tenant." This rule has no application in this case, because—

(a) While the *term* of the lease may be doubtful, in that it may be determined at any time by the service of a ninety-day notice to quit, this does not destroy it as a binding contract. Leases for years, with limitations, conditions, etc., rendering the *duration* doubtful, have been repeatedly upheld, as we will show hereinafter.

(b) Even though the lease is of doubtful duration, how is to be construed "mostly strongly against the landlord"? Is it a lease for years, with a limitation or condition? Is it a lease "by the month"? Is it a lease at will? (Code, D. C., Secs. 1035-1036.) Suppose the tenant should elect to give ninety days' notice of his intention to terminate the lease, could the landlord contend that the lease is not thus terminable? These questions present themselves, in determining whether or not a provision plainly written in a lease shall be given effect. We contend that the clause giving the right to either party to terminate the lease on ninety days' notice must be given effect, and that it operates on the lease under consideration (construed most strongly against the landlord, *Mary V. Joseph*), so as to render it anything but an absolute term for three or six years. And ninety days' notice having been duly served on *Zantzinger*, *Mrs. Joseph* is entitled to possession whatever the nature of the tenancy may be. The Code of the District prescribes the manner of determining estates by the month, or at will, etc.—D. C. Code, Ch. 39.

(c) There is another rule of construction of deeds and contracts applicable to this case. Contracts drawn by one of the parties should be construed most strongly against the party drawing the contract.

Jaselli vs. Simmons (S. C. D. C.), 39 Wash. Law Rep., 618, and cases cited.

In this case it is conceded that *Zantzinger*, the tenant, prepared his own lease.

Third. Counsel for appellant urges that "in the case of ambiguity the court will give to the paper the construction which the parties themselves have given it," and cites 24 Cyc., p. 960, as authority for the proposition that the construction placed upon an ambiguous lease by the acts of the parties, if in itself admissible, will be adopted. We submit, however, that there are several qualifications to the rule, as stated, which render its applicability to the lease here in question, of doubtful utility.

The ninety days' notice clause does not render the lease ambiguous. It is not unusual to limit an estate for years, as in said lease provided, and such a limitation does not create an ambiguity. There is no contention of fraud, accident or mistake and the written contract is conclusively presumed to record the intention of the parties.

Cortelyou vs. U. S., ex rel Thorp, 32 App. D. C., 20;

17 A. & E. Ency. L., 2nd Ed., p. 4.

The case having been submitted on affidavits, of course many questions, such as the circumstances under which the letter written by Mrs. Joseph (and referred to in appellant's brief) was obtained by Zantzinger, or whether or not she personally had knowledge of all the terms of the lease, can not be here discussed. This much may be said, however,—the letter written by Mrs. Joseph months after the rent agreement was made can not be used to alter or vary the terms of the written contract and can not be said to create a new contract since there is no consideration for it, and as for using it as evidence of the intention of the parties to the contract it is respectfully submitted that Mrs. Joseph was not a party to the original contract. She is the assignee of the lease, and what she may have said in reference to the

contract months afterwards can not be conclusive as to what was in the minds of the original parties to the agreement. The parties were negotiating a settlement of their troubles, and Mrs. Joseph in writing the letter merely referred to the lease in a general way and did not in her letter enter into any interpretation or construction of said lease; she merely referred to the lease to identify the subject matter under discussion. It is for the Court to determine what the contract is.

For authority on inadmissibility of oral testimony to vary the terms of a written lease, see,

Tiffany on L. & T., Vol. 1., Sec. 12, p. 68.

Woods, L. & T., Vol. 1, pp. 623-34-35.

18 A. & E. Ency. L., 2nd Ed., p. 618.

The construction of a contract by the parties is not binding where the instrument is not ambiguous. And we contend that the ambiguity is cleared up by the ninety-day notice clause.

17 A. & E. Ency. L., 2nd Ed., p. 23.

It has been held that the general rules applicable to the construction of all written instruments, apply to leases.

Tiffany L. & T., Vol. 1, p. 288.

And the instrument must be considered as a whole.

17 A. & E. Ency. L., 2nd Ed., p. 4.

The provision for a ninety-day notice to determine the lease, requires said notice to be given "at least *thirty* days" before the tenancy is to be determined (R., p. 8). The word "thirty" is repugnant to the context, and may be rejected.

17 A. & E. Ency. L., 2nd Ed., p. 19.

One of the general rules of construction of written instruments, is to so construe them as to arrive at the intent of

the parties *from the language employed*. To do this in this case the lease must be read from its four corners. What did Zantzinger mean when he provided for ninety days' notice in writing in order to terminate the estate for years provided for in the lease? What is the *legal effect* of the *language employed*?—not what *might have been meant*.

Woods, L. & T., Vol. 1, 2nd Ed., Sec. 299, p. 620.

17 A. & E. Ency. L., 2nd Ed., p. 4.

The parties to the lease were *sui juris* and had the right to make any sort of contract they desired, and it is not for the court to undo what has been solemnly agreed upon. It is incumbent to give effect to the ninety-day notice clause, regardless of the effect it may have on the term provided for in the lease, *because the parties themselves have, under seal, deliberately and without equivocation, so decreed*. So that, whatever view the court may take of the nature of the estate, with the said clause appended, the appellee, having complied with the requirements as to determining the estate, is entitled to the property. However, it may be interesting to consider the various kinds of qualifications which may limit, determine and otherwise affect estates expressed to be for years.

An estate for years may be determined by a *condition*, *i. e.*, the happening of some event giving the landlord the right to terminate the lease. Or such an estate may be determined by words of *limitation* of the estate, whereby, upon the mere happening of the event specified, the estate *ipso facto*, is determined, no action by the landlord being necessary. For discussion of conditions and limitations, and the distinction between the two, see

Tiffany on L. & T., pp. 68 and 1368.

McAdam, L. & T., Vol. 1, p. 45.

In considering leases for years, determinable upon contingencies, it is said that the contingency must be *certain*, and if the lease is not executed so as to pass a freehold, it can create but a tenancy *at will*.

Tiffany L. & T., pp. 57 and 60, citing *Western Transp. Co. vs. Lansing*, 49 N. Y., 499, where the tenant was to occupy "for so long as the lessee may please," and other cases.

Viewed under the last mentioned rule, if the clause in the lease at bar be deemed to render the term uncertain, then the lease is one *at will*.

It has been repeatedly held that leases for years may be terminable at the option of either party, absolutely, or with some qualification,—sometimes with notice, and sometimes without notice, and the lease in this case seems to fall into this general class. Following we give extracts from some of the text books and cases:

"Not infrequently the lessor is given the right to terminate the tenancy, before the expiration of the term named, such a right being sometimes absolute in character, and sometimes authorizing him to terminate only for some particular reason, as where he (the landlord) wants to build."

"And the right to terminate, otherwise absolute in character, may be restricted as regards the time at which the right may be exercised."

Tiffany L. & T., p. 63, where examples are given of leases for years determinable at a shorter period at the option of one of the parties.

Tiffany L. & T., Sec. 12, p. 70, citing *Fine Realty Co. vs. City of New York*, 103 N. Y. Supp., p. 115, construing a lease for years with the right of landlord to terminate on sixty days' notice.

The following cases cited in Tiffany on Landlord and tenant, page 70, give examples of estates for years which may be terminable upon the option of the lessor, absolute in some cases and only for particular reasons in others:

- Pratt vs. Paine, 119 Mass., 439. (Suit for loss sustained by lessee by reason of lessor's exercise of right to terminate five-year lease during first three years as provided in the lease.)
- Lord vs. Walker, 49 Mich., 606. (A three-year lease with proviso that unless property was sold for a certain price or the lessor returned to the farm, lessee to continue to occupy demised premises. At the end of the second year, after three months' notice, as lease provided, the lessor returned to the farm. Held, that landlord was entitled to resume possession.)
- Liddy vs. Kennedy, L. R., 5, H. L., 134. (A seven-year lease with right to resume for building purposes upon three months' notice. Held, that the ejectment was consequential on the *notice*, and not upon any breach of covenant.)
- Manhattan Life Insurance Co. vs. Gosford, 23 N. Y. Supp., 7. (Lease for one year with right of landlord to terminate on two months' notice. Held not to be a *condition subsequent* but the term expired by *limitation*.)
- Shaw vs. Hoffman, 25 Mich., 162.

McAdam on landlord and tenant discusses and recognizes the validity of leases for years subject to be determined at the election of the parties, or one of them. The author says:

"Sometimes the lease is for a certain number of years, determinable at the election of the parties, or one of them. Where the option is given expressly for each party no question can arise and the term may be determined by either * * *."

"Where the lease gives the lessor the right to terminate the tenancy at any time should he deem it an undesirable one, it is held he is not bound to assign any reason why he deems it undesirable."

McAdam L. & T., Sec. 173, page 597, citing *Manhattan Life Insurance Company vs. Gosford*, 3 Misc., 509; 23 N. Y. Supp., p. 7, where the landlord was held entitled to terminate the lease without giving any reasons.

"Leases for terms of years quite often confer upon the lessee an option to terminate the lease before the expiration of the term, or reserve to the lessor a similar privilege."

A. & E. Ency., L. 2d Ed., Vol. 18, p. 630.

"And the privilege may inure to the benefit of the grantee of the reversion."

Id., p. 630.

See following cases in which leases for years were held determinable at the election of the parties, or either of them:

Taylor, et al., vs. Frohock, 85 Ill., 584. (Five years if not sold.)

Smith vs. Rasin, 84 Md., 642. (Fifteen-year lease with the right of the landlord to determine at the end of the tenth year upon giving notice.)

Lord vs. Walker, 49 Mich., 606. (Three years with the right of landlord to terminate at the end of two years after three months' notice.)

Johnson vs. King, 83 Wis., p. 8. (Lease for a term with proviso that landlord can determine in case of sale.)

Porter vs. Shepherd, 6 T. R., 665. (Seven-year lease with right of tenant to terminate in three or five years.)

Friar vs. Grey, et al., 5 Exchequer, p. 584.

Bolton vs. Lingham, 1 Starkie, p. 39. (For years with option of tenant to vacate.)

The case of *Friar vs. Grey, et al.*, 5 Exchequer, p. 584, is very similar to the case at bar, and we respectfully call the Court's attention to the same. In that case the plaintiff demised to the tenant a coal mine for forty-two years at a certain yearly rent. The lease contained numerous covenants on the part of the lessee, such as for the payment of rent and in respect to the working of the mine, etc., with a proviso for re-entry on the breach of any of said covenants; the lease also contained a proviso that if the lessees should be desirous of quitting the premises at the end of the first eight years of the term, and should give notice of their desire to the lessor eighteen months before the expiration of such eighth year, then (all arrears of rent being paid and all of the several covenants and agreements on the part of the lessee having been observed and performed) the lease should at the expiration of the eighth year be utterly void. It was held in the Exchequer Chamber (reversing the judgment of the Court of Exchequer) that the limitation of the estate was valid, and that the performance of all of the covenants by the lessee was a condition precedent to his right to determine the lease.

In the case at bar we have exactly the situation as set forth in the case of *Friar vs. Grey*. There is a lease for a definite number of years. There are covenants giving the landlord the right to re-enter upon breach of said covenants, and there is the further proviso that the lease may be determined upon the giving of a notice.

CONCLUSION.

Whatever difficulty has arisen in this case is due to the ignorance or negligence of the scrivener who prepared this lease in providing terms absolutely contrary to each other. In other words, the appellant is himself the author of the instrument that produces this litigation, and he is now ask-

ing this court to put a construction upon his own inexplicable language that is favorable to his own interests. Suppose the lease, instead of being a benefit to appellant (as we must assume it to be, because of his perseverance in this litigation), were a burden that he were glad to be rid of, he would then be here asking the court to construe his insensible language into such an estate as would relieve him from further payment of rent. In this situation, where rules by which the construction of ambiguous instruments, invoked by the respective parties hereto, appear to be at least in equilibrium, it is respectfully submitted that this is a proper case for the application of the rule that where an instrument is so ambiguous as that it can not be interpreted by the court then the estate created will be treated as one at will.

Woods L. & T., 2nd Edition, pp. 45-52.

We respectfully submit that the judgment of the Supreme Court of the District of Columbia should be affirmed.

Respectfully submitted,

GEORGE C. SHINN,
CLAUDE W. OWEN,
Attorneys for Appellee.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Otway E. Zantzinger,
Appellant,

-vs-

Mary V. Joseph,
Appellee.

No. 2772.

MEMORANDUM OF ADDITIONAL AUTHORITY.

In the case of Whitford vs. Engel, 42 App. D. C., p452, the lease was for fifteen years, unless the premises should be taken in condemnation proceedings. The validity of the lease was not involved, the case arising out of certain provisions in the lease respecting the liability of the lease for breach of covenant to make improvements.

In the case of Wisner vs. Richards (Washington State) reported in 62 Washington 429, the lease was for a fixed term (nine months) with a stipulation that the tenant should vacate the premises upon thirty days' notice for cash bonus of \$300.00. Held, that upon the landlord giving the notice, as prescribed, he thereby terminates the tenancy and binds himself to pay the bonus, even though he had afterwards notified the tenant, while in possession, that the notice was given by mistake and that the tenant might remain until the end of the term.